No. 76-44

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM JOSEPH MCMURTREY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 534 F. 2d 1321 (Pet. App. A-1 to A-3). The decision of the district court is reported at 405 F. Supp. 777.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1976. A petition for rehearing was denied on June 4, 1976. On June 15, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to July 13, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the lawful owner of property, who enjoys a continuing right of access to the property, may consent to a search of that property.

STATEMENT

After a jury-waived trial in the United States District Court for the Eastern District of Missouri, petitioner and Edward August Ockel were convicted on one count of conspiring to distribute marijuana and two counts of possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. Each was sentenced to concurrent terms of five years' imprisonment on each count, followed by a two-year term of special parole. The court of appeals affirmed *per curiam* (Pet. App. A-1 to A-3).

Before trial, petitioner and his co-defendant moved to suppress marijuana seized by federal officers from a shed on a farm owned jointly by Ockel's parents and operated by his father.

Prior to the search, Ockel's parents had developed marital difficulties and Ockel's father apparently moved out of the house (Pet. App. A-2).[1] He nevertheless continued to operate the farm and used the shed on several occasions. The shed immediately adjoined the house and was used for storage of small tools, a chain saw, painting and garden equipment, and similar materials. The shed could not be entered through the house but only through its own independent entrance. *Ibid*

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[1]While the court of appeals assumed that Mr. Ockel had left the house, the district court stated: "The facts adduced at trial do not clearly indicate whether or not Mr. Ockel, Sr. had given up his residence at the house on his farm" (405 F. Supp. at 778).

The district court found that in May 1975 Ockel's father had become suspicious of certain material in the shed and had requested the Drug Enforcement Agency to inspect the shed (405 F. Supp. at 778). DEA agents then conducted several searches with Mr. Ockel's consent and uncovered the marijuana on which the instant convictions were based (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 5-7) that Ockel's father could not consent to a search of the shed on his farm and that the marijuana found by the government agents should have been suppressed. This contention is without merit. In *United States* v. *Matlock*, 415 U.S. 164, 171, this Court stated that permission to search may be "obtained from a third party who possessed common authority over or other sufficient relationship to the premises * * * to be inspected." The district court in this case found that Ockel's father "had not given up his rights to access to the shed" (405 F. Supp. at 778) and that he "kept various tools, and lawn and garden equipment, in the shed, which he used to maintain the lawn around the house and for other work on the farm" (*id.* at 779). That relationship was sufficient to give him authority to consent to a search of those premises. Moreover, petitioner concedes (Pet. 5) that the district court utilized the proper legal test and merely differs with its application to these facts. That question does not warrant further review.

2. Furthermore, petitioner was without standing to contest introduction of the evidence on the conspiracy count. Petitioner concededly had no possessory right or other recognizable interest in the shed, or in the property on which the shed was located (Pet. 8). While the concept of "automatic" standing, which is in our view outdated, arguably might confer standing to contest the evidence

with regard to the possession counts (*Brown* v. *United States*, 411 U.S. 223), the conspiracy count does not depend upon the evidence of possession itself. Thus, petitioner's argument at most applies to two of the three counts for which he received identical concurrent sentences.[2]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[2]This Court stated in *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16: "Although affirmance of petitioner's conviction on two of the six counts carrying identical concurrent sentences does not moot the issues he raises pertaining to the remaining counts, *Benton* v. *Maryland*, 395 U.S. 784 (1969), we decline as a discretionary matter to reach these issues. Cf. *United States* v. *Romano*, 382 U.S. 136, 138 (1965)."